(3)

No. 90-927

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1990

COUNTY OF LOS ANGELES

Petitioner,

v.

DANIEL E. BRATT, et al.

Respondents.

BRIEF OF THE COUNTY OF KERN, AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI BY LOS ANGELES COUNTY

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Statement of Related Cases

Closely related issues are presented in the Petition for a Writ of Certiorari entitled County of Kern, Petitioner, v. Dan Abshire, et al., Respondents, Number 90-839, October Term, 1990. Counsel of record for Amicus is also counsel of record in the related case.

Statement under Rule 36.4

The County of Kern is a political subdivision of the State of California. The Office of County Counsel, by counsel of record, is the authorized law officer of the County. Therefore, no consent of the parties appears to be required under Rule 36.4.

Interest of Kern County in the Present Controversy

The related case involves the viability of the "Salary Test" (see 29 U.S.C. §§207, et seq.) of the Fair Labor Standards Act ("FLSA") as a measure of whether a supervisory public employee is exempt from FLSA coverage for overtime purposes. All positions classified by Kern County as exempt managerial jobs meet all criteria of the FLSA as to job duties. No such jobs meet the "Salary Test" as presently interpreted and applied by the Ninth Circuit.

Kern County has about 7,000 employees providing basic services to just over 500,000 residents, over an area of more than 8,000 square miles -- an area larger than several eastern states. Given the

difficult terrain, available manpower and nature of required basic services, the County must budget with great care, and conserve wherever appropriate. For example, one may consider the problem of affording adequate fire protection, basic and emergency health care and police protection over so vast an area.

About 1,200 Kern County employees are classified as exempt. About 1,000 employees, under the present court rulings, could be found non-exempt. Informal estimates of the accrued back overtime to April 15, 1986 (the date FLSA again became applicable to public employers) range from $8,000,000 to $13,000,000, plus interest. There is at least some possibility liquidated damages could be awarded (29 U.S.C. §216(a))

which would double that amount.

The loss of such an amount would be devastating, in light of the present combination of shrinking state and federal support for local governments, the fast growth of Kern County (like many "sunbelt" areas) and state tax reforms which limited local property tax revenues to 1% of assessed value. Basic public services would be impacted, employees would likely be furloughed contributing to unemployment in an area already plagued by higher than average unemployment.

Further, counsel of record has received an average of six to eight telephone calls per week, from September 1990 to the present, concerning the Abshire

decision in the Ninth Circuit. These calls, received from dozens of local entities in virtually every part of the nation, uniformly express concern about both the present fiscal exposure to back overtime pay, and the future inability to maintain traditional civil service. There is a strong national interest in having the Supreme Court consider this problem and afford relief to local governments.

The interest of Kern County and other local entities arises from the Hobson's choice which now confronts them; local governments must (under the present lower court rulings) either give up proven and traditional civil service compensation practices, or continue them at peril of financial ruin. The Supreme Court should

grant the Petition in the instant matter, in the related Abshire matter, or both, and should carefully weigh the important policy and Constitutional issues at hand.

Argument

The effects of the Ninth Circuit's position as contained in the present and related cases has been above stated as to Kern County. The fiscal impact on more urban and populous local entities can easily be inferred. The danger is not "just" the exposure to back overtime pay liability, but also to future costs and disruption. In the absence of private sector economic factors, such as a profit motive and employee bonus or profit-incentives, close monitoring of hours worked, accrued leave time and

unauthorized absences has always been the basis of civil service compensation systems.

That a sufficient rationale for some, at least limited application of FLSA to public employment exists appears from Garcia v. San Antonio Metropolitan Transit Authority (1985) 469 U.S. 528, and cases preceding. In making such an application, under both the spirit and letter of the Tenth Amendment and the language of Garcia, restraint and concern for federalism are mandatory. If FLSA is to be applied, the proper application is one that intrudes as minimally as possible on local governments. The intrusion must be as far, and only as far as is absolutely and irreducibly necessary to accomplish legitimate

federal purposes.

The FLSA on its face, and as read by Congress (see, e.g., Public Law 99-150 (1985), the Congressional Record, S14046-14057, 14095ff, etc.) is intended to provide a decent minimum for rank and file employees in relatively lower wage positions. Even in the private sector, the FLSA was not designed to increase compensation for more highly paid supervisory employees. See, e.g., 29 U.S.C. §202, and Congressional materials above cited, which discuss a "decent minimum" for "nonsupervisory" workers.

And yet, in the case at bar and in the related case, an extraordinary excursion has been made into the essential relationship of local governments and

their managerial and professional employees. This incursion is premised on the consumption of interstate goods and commerce by local entities (Maryland v. Wirtz (1968) 392 U.S. 183; Overruled National League of Cities v. Usery (1976) 426 U.S. 833; Overruled Garcia v. San Antonio Metropolitan Transit Authority, supra). This basis is tenuous at best, and may not in reality be supportable at all. Such a precarious foundation militates in favor of extreme reluctance to extend FLSA very far into the public sector.

Garcia, supra, involved (non-supervisory) public employees involved in transportation. Transportation has, of its own nature, a far greater connection with interstate commerce than does mere

consumption of goods and services which may have moved through interstate channels. While Garcia may permit a limited application to government services which are a part of the chain of interstate commerce, it is a long stretch to apply the FLSA to peculiarly local services such as fire and police protection or local criminal justice workers. It is equally a long stretch to posit intrusion into the area of pay for local public managerial employees.

Conclusion

It is imperative the Supreme Court consider the profound Constitutional and public policy consequences of the course on which the Ninth Circuit has embarked respecting the manner in which FLSA

applies to local entities. The County of Kern therefore urges, for itself and in the interests of local governments throughout the country, the Petition for a Writ of Certiorari be granted in either the present or related case, or both.

At a minimum, courts below should be signalled a need to proceed with caution and conservatism in this area, by a grant of the Writs, summary reversals and directions to the courts below.

Respectfully submitted,

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